SUBJECT INDEX

	Page
Jurisdiction	1
Statute Involved	1
Counter-Statement of Question Presented	2
Counter-Statement of the Case	2
Summary of the Argument	12
Argument	16
I. The Question Who Is an Indispensable Party to an Action in a State Court That Is Wholly Between Local Parties and That Involves Only Their Rights Under a Contract to Which No Federal Agency or Official Is a Party, Is a Question of State Law, Not Reviewable by This Court	16
II. Invalidity of the Contracts in Suit by Reason of PHA's Contractual and Statutory Relations With the Authority Was Not a Question Raised or Decided Below	18
III. Except for Joinder of an Alleged Indispensable Party, None of the "Questions Presented for Review" Was Raised or Decided Below	21

IV. Page

The Record Presented by Petitioner so Far Fails to Include Matters Necessary to a Ready and Adequate Understanding of the Points Made, as to Justify Denial of the Petition 25

Conclusion 27

Appendix. California Code of Civil Procedure, Section 389 [Cal. Stats., 1957, c. 1948, p. 2824.] .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
American Ry. Express Co. v. Kentucky, 273 U.S. 269	16
Barrows v. Jackson, 346 U.S. 249	8
Black v. Cutter Laboratories, 351 U.S. 292	16
Bowles v. Superior Court, 44 Cal. 2d 574, 283 P. 2d 704	18
Charles Dowd Box Co. v. Courtney, 368 U.S. 502	24
City of Boston v. Jackson, 260 U.S. 309	16
City of Los Angeles v. County of Mono, 51 Cal. 2d 843, 337 P. 2d 465	9
Ciucci v. Illinois, 356 U.S. 571	25
County of Kings v. Scott, 190 Cal. App. 2d 218, 11 Cal. Rptr. 893	9
Crofton v. Young, 48 Cal. App. 2d 452, 119 P. 2d 1003	18
Dandini v. Dandini, 120 Cal. App. 2d 211, 260 P. 2d 1033	11
Dean v. Davis, 51 Cal. 406	11
Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616	18
Durley v. Mayo, 351 U.S. 227	12, 17
Edelman v. California, 344 U.S. 357	12, 17
Egan v. San Francisco, 165 Cal. 576, 133 Pac. 294	11
Hedgebeth v. North Carolina, 334 U.S. 806	12, 17
Herb v. Pitcairn, 324 U.S. 117	16
Hiller v. Los Angeles, 197 Cal. App. 2d 685, 17 Cal. Rptr. 579	11

Page

Housing Authority v. Los Angeles, 38 Cal. 2d 853, 243 P. 2d 515 4

Housing Authority v. Superior Court, 35 Cal. 2d 550, 219 P. 2d 457 4

Land v. Dollar, 330 U.S. 731 24

Lawn v. United States, 355 U.S. 339 25

Liberty Warehouse Co. v. Burley T.G. Co-op, Assn., 276 U.S. 71 18

McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 18

Miller v. McColgan, 17 Cal. 2d 432, 110 P. 2d 419 11

McClellan v. Carland, 217 U.S. 268 25

Muller v. Robinson, 174 Cal. App. 2d 511, 345 P. 2d 25 18

Newsom v. Smyth, 365 U.S. 604 1

Ohio ex rel. Popovici v. Agler, 280 U.S. 379 24

Patterson v. Standlind Oil etc. Co., 305 U.S. 376 1

People v. Valley Drive-In etc. Corp., 206 Cal. App. 2d 309, 23 Cal. Rptr. 626 9

San Francisco Gas L. Co. v. Dunn, 62 Cal. 580 11

Silva v. Holland, 74 Cal. 530, 16 Pac. 385 12

Smith v. O'Grady, 312 U.S. 329 16

Stembridge v. Georgia, 343 U.S. 541 12

Tileston v. Ullman, 319 U.S. 44 18

United States v. Borden Co., 308 U.S. 188 21

W. H. Marston Co. v. Kochritz, 80 Cal. App. 352, 251 Pac. 959 12

Page

Walsh v. Superior Court, 92 Cal. App. 454, 268 Pac. 442 18

Williams v. Kaiser, 323 U.S. 471 16

Rules

Rev. Rules, Rule 10, 2(b) 26

Rev. Rules, Rule 12(1) 26

Rev. Rules, Rule 21(1) 26

Rev. Rules, Rule 23(1) 13

Rev. Rules, Rule 23(4) 15, 25

Statutes

California Code of Civil Procedure, Sec. 387 18

California Code of Civil Procedure, Sec. 389 ..... 1, 22

California Code of Civil Procedure, Sec. 389.5 18

California Code of Civil Procedure, Sec. 1010 11

California Health and Safety Code, Sec. 34200 4

California Health and Safety Code, Sec. 34201 4

California Health and Safety Code, Sec. 34212 4

California Health and Safety Code, Sec. 34217 24

California Health and Safety Code, Sec. 34240 4

California Health and Safety Code, Sec. 34275 11

California Health and Safety Code, Sec. 34278 5

California Health and Safety Code, Sec. 34310 ....4, 11

California Health and Safety Code, Sec. 24311(a) 5, 11

California Health and Safety Code, Sec. 34311(d) .. 5

California Health and Safety Code, Sec. 34312 4

Page

California Statutes of 1907, Ch. 327, Sec. 1, p. 601 11
California Statutes of 1938, Ex. Sess., Ch. 4, p. 10 .. 4
California Statutes of 1951, Ch. 710, p. 1952 5
California Statutes of 1953, Ch. 1802, p. 3587 5
California Statutes of 1957, Ch. 764, p. 1978 5
California Statutes of 1957, Ch. 1498, p. 2824 1
United States Code, Title 28, Sec. 1257 1
United States Code, Title 42, Sec. 1401 .....18, 20
United States Code, Title 42, Sec. 1410 20
United States Code, Title 42, Sec. 1410(a) 20
United States Code, Title 42, Sec. 1410(b) 20
United States Code, Title 42, Sec. 1410(c) 20
United States Code, Title 42, Sec. 1410(f) 20
United States Code, Title 42, Sec. 1413 20
United States Code, Title 42, Sec. 1413(a) 20
United States Code, Title 42, Sec. 1415 20
United States Code, Title 42, Sec. 1415(3) 21
United States Code, Title 42, Sec. 1421 20
United States Code, Title 42, Sec. 1421(a) 20

Textbooks

23 West's Annotated California Codes, Pt. 2, p. 30 9
3 Witkin, California Procedure, Sec. 12(b), p. 2154 18

IN THE

Supreme Court of the United States

October Term, 1967
No. 763

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, a body corporate and politic,

Petitioner,

vs.

HOWARD L. HOLTZENDORFF and BARBARA ROSIEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Jurisdiction.

The within Court is without jurisdiction to review the judgment entered below in the State court, for the reason that no federal question was raised or decided below. 28 U.S.C., sec. 1257, therefore, does not sustain the jurisdiction, but rather, negates it. [*Newsom v. Smyth,* 365 U.S. 604; *Patterson v. Stanolind Oil etc. Co.,* 305 U.S. 376, 379.]

Statute Involved.

The only statute involved in the questions here sought to be presented by petitioner is section 389 of the California Code of Civil Procedure. It is found in the official edition in California Statutes, 1957, c. 1498, p.

2824. The statute deals generally with who is an indispensable party to litigation maintained in the State courts of California. Its provisions are set forth *verbatim* in the Appendix to this brief.

Counter-Statement of Question Presented.

In an action in the State court, wholly between residents and a public corporation of the forum state, for breach of a local contract, to which contract only the litigants were parties, and in which action no issue of federal law or right was raised or decided, is it a denial of federal right to deny a motion of one of the parties to join a federal administrative official as an alleged indispensable party, the denial of the motion being based, entirely as a matter of state law, on the provisions of a general state statute which, without discrimination against or separate reference to federal agencies or officials, defines who are indispensable parties to an action in the State courts?

Counter-Statement of the Case.[1]

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[1]The following abbreviations are used in this brief:

"App."—Appendix.

"Authority"—The petitioner Housing Authority of the City of Los Angeles.

"Clk. Tr."—Clerk's Transcript.

"H. & S. Code"—California Health & Safety Code.

"Pet."—Petition for a Writ of Certiorari.

"PHA"—Public Housing Administration of the United States.

"Rep. Tr."—Reporter's Transcript on Appeal.

"Rev. Rules"—United States Supreme Court Revised Rules (1954).

"Supp. Clk. Tr."—Supplemental Clerk's Transcript.

The caption of this cause as printed on the cover of the petition is incorrect. It is in fact the caption of the cause in the State Court of Appeal below. The correct caption, showing the Authority as the petitioner here is printed on page 1 of the petition.

1. Petitioner's statement of the case is noteworthy for the positiveness and unqualified sweep of the assertions in it; and, as well, for the paucity of references to the record on appeal, to which, if there were any evidential support for those assertions, it would have been easy to refer.

There is also a glaring omission of an essential fact from petitioner's statement. There are repeated references in the petition to the provisions of a "contributions contract" between PHA and the petitioner. An asserted conflict between that contract and the employment contracts in suit, leading to the alleged invalidity of the latter [see, *Pet.*, 4-7, 9-11, 15-20, 22, 25-26], is strongly relied on as a reason why certiorari should be granted. Yet, there is no mention in the petition of the fact that the contributions contract, though offered by petitioner, was excluded from evidence. [Rep. Tr., p. 109, line 20, to p. 113, line 1.] No exception to that ruling was ever taken, and it was not specified as error on the petitioner's appeal. [See, footnote 17, *infra.*] All references by petitioner to the contributions contract, are, therefore, entirely outside the record [see, footnote 19, *infra*]; and there is no decision in respect of it to be reviewed.

Another notable omission from the petition is the omission to refer to any proceedings or evidence that would give rise to the "Questions Presented for Review" [*Pet.* 3. See, Points III and IV, *infra.*] The ommission is understandable; there were no such proceedings or evidence.[2]

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[2]The only one of the questions now presented that was raised and decided below was the state-law question whether the PHA commissioner was an indispensable party [See, Point I, *infra.*]

That part of petitioner's statement of the case that deals with the statutory and contractual background of the relationship between PHA and the Authority [*Pet.* 4-8], is similarly incomplete and inaccurate. The contract, as we have shown, is not here, indeed, was not received in evidence below; and the statute upon which Petitioner relies does not give PHA such control over the Authority's operations and affairs as petitioner asserts. [See, Point II, *infra.*]

2. The petitioner, Housing Authority of the City of Los Angeles is a public corporation organized and existing under and by virtue of the Housing Authorities Law of the State of California.[3] [Clk. Tr., p. 18, lines 22-25 (allegation not denied, Clk. Tr., p. 35, lines 19-25); p. 80, line 20.] In that Law the Authority is described as "a public body corporate and politic." [*H. & S. Code,* secs. 34240, 34310.] Despite its name, it is not an agency of the City of Los Angeles, but an administrative agency of the State of California, organized to effectuate that State's policy of eliminating slums and providing low-rent public housing for persons of low income. [*H. & S. Code,* secs. 34201, 34212, 34312. See, also: *Housing Authority v. Los Angeles,* 38 Cal. 2d 853, 861-862, 243 P. 2d 515, 519; *Housing Authority v. Superior Court,* 35 Cal. 2d 550, 559, 219 P. 2d 457, 462.]

This "public body corporate and politic" has "all the powers necessary or convenient to carry out the pur-

[3]The "Housing Authorities Law" [see *H. & S. Code,* sec. 34200] is Chapter 1 (beginning with section 34200) of Part 2 of the Health & Safety Code of the State of California. [Cal. Stats., 1938, Ex. Sess., c. 4, p. 10.] It has been amended several times. In the respects here involved, it will be most convenient to refer to it as published in volume 41A of West's Annotated California Codes, where it appears as amended through 1966.

poses and provisions of" the Housing Authorities Law. Among the specific powers with which it is endowed by the statute, are: (1) to sue and be sued [*H. & S. Code,* sec. 24311(a)]; (2) to make and execute contracts [*H. & S. Code,* sec. 34311(d)]; and (3) to employ a secretary, who shall be executive director, and such other officers, agents, and employees as it requires and, among other things, determine their compensation and the terms of their employment. [*H. & S. Code,* sec. 34278.[4]]

The Authority has developed and operates a number of low-rent housing projects, which produce revenues. [Rep. Tr., p. 218, line 8, to p. 221, line 11.] Some of these projects were relinquished to it by PHA. [Rep. Tr., p. 501, line 14, to p. 507, line 15; p. 1109, line 15, to p. 1110, line 6.] It received some financial assistance from PHA by way of loans and contributions; but, the extent of and terms upon which that assistance was rendered are not shown in the record. Neither

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[4]Section 34278, in its entirety, reads as follows:

"An authority shall select from among its commissioners a vice chairman. It may also employ a secretary, who shall be executive director, technical experts, and such other officers, agents, and employees as it requires, and shall determine their qualifications, duties, terms of employment and compensation." [Cal. Stats. 1951, c. 710, p. 1952, as amended Cal. Stats. 1953, c. 1802, p. 3587, and Cal. Stats. 1957, c. 764, p. 1978.]

Pursuant to this power the respondents, Howard L. Holtzendorff and Barbara Rosien, were duly employed as Secretary and Assistant Secretary, respectively, under written contracts of employment which specified the terms of their employment and the compensation to be paid them. It was to recover damages for the wrongful discharge from that employment that this action was brought. Upon jury verdicts expressly finding that the discharge was without "just or lawful cause" and awarding substantial damages [Rep. Tr. p. 2024, lines 1-14; Clk. Tr. p. 79, lines 6-8, 27-32. Supp. Clk. Tr. p. 410, lines 17-29] the judgment here sought to be reviewed was entered.

is it shown whether there is any outstanding indebtedness owing PHA or any lien or charge upon the Authority's property in favor of PHA. [Rep. Tr., p. 220, line 10, to p. 221, line 11.] PHA was not a party to the employment contracts in suit; and, so far as can be gathered from the record, nothing in the relationship between the Authority and PHA gave the latter any control over or interest in those contracts.[5] [See, Point II, *infra.*]

3. The respondent Barbara Rosien was first employed by the Authority, as Assistant Secretary, in 1938; the respondent Howard Holtzendorff was employed as Secretary and Executive Director on February 1, 1941. The two of them served continuously in their respective positions until their wrongful discharge on March 26th, 1963. [Supp. Clk. Tr., p. 398, lines 9-21; p. 399, line 1, to p. 400, line 19; p. 401, line 27, to p. 403, line 15; p. 407, lines 7-12. Rep. Tr., p. 30, line 20, to p. 32, line 4; p. 217, line 23, to p. 218, line 3; p. 222, line 24, to p. 223, line 11; p. 326, line 22, to p. 333, line 4; p. 741, line 25, to p. 742, line 25; p. 755, lines 10-20; p. 968, line 18, to p. 969, line 24; p. 1042, line 9, to p. 1043, line 15; p. 1526, line 3, to p. 1527, line 2.]

At the time of the wrongful discharge the respondents were working under written contracts of employment, which had been duly authorized by the Authority's governing board. These contracts fixed the term of

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[5]Petitioner frequently asserts that PHA had the right to audit the Authority; and from that right it deduces some power of fiscal and operational control. Petitioner does not specify where in the record the source of that power can be found. It is not in the Housing Act of 1937; nor can it be assumed to be in the "contributions contract," which is not in evidence or in this record. [See, Point II, *infra.*]

employment as one ending December 31, 1967, as well as the compensation to be paid the employees and the other terms of employment.[6] [Clk. Tr., p. 79, lines 6-26. Rep. Tr., p. 7, line 18, to p. 8, line 20; p. 357, line 1, to p. 366, line 1; p. 372, lines 16-25; p. 373, line 1, to p. 376, line 6.]

For at least six years or so, immediately preceding execution of the employment contracts that were current at the time of the wrongful discharge, the respondents had been employed under similar written contracts fixing the duration, compensation and other terms of their employment. [Rep. Tr., p. 7, line 19, to p. 11, line 6; p. 394, line 16, to p. 396, line 4. Clk. Tr., p. 79, lines 6-8; p. 80, lines 7-14; Supp. Clk. Tr., p. 401, line 27, to p. 403, line 15.] Each year PHA audited the Authority's accounts; and about every three years (the latest one prior to the trial of this cause was in 1961) PHA made a comprehensive review of the operations of the Authority and transmitted to it an extensive report of its findings, exceptions and recommendations. At no time did PHA ever except or object to the employment contracts with respondents or to the payment of the compensation called for thereby. [Rep. Tr., p. 44, line 13, to p. 45, line 18; p. 442, line 14, to p. 443, line 5; p. 644, line 24, to p. 652, line 5; p. 839, line 17, to p. 841, line 25; p. 917, lines 13-19; p. 1291, lines 5-17.]

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[6]The contracts were received in evidence in the trial court [Rep. Tr. p. 7, line 19, to p. 8, line 20] and were part of the record on appeal below. [Clk. Tr., p. 134, lines 24-26.] They have not been included by the petitioner in the record it caused to be certified to this Court. Indeed, none of the more than 138 documentary exhibits received below [see, Rep. Tr., vol. 1, pp. iii-xii] has been brought here.

PHA's audit report for 1961 (the latest one available at the time of trial) may be taken as a typical example of PHA's auditing and reporting procedures. The petitioner's fiscal officer, reviewing the PHA audit report for the information of the Authority's governing board, said that the report was correct and, inasmuch as there were no audit findings in it, the indications were that "all fiscal operations and expenditures [of the Authority] have been reviewed for compliance with Public Housing Administration policies, standards and contractual provisions, as well as this agency's policies and found to be fully in accordance therewith."[7] [Rep. Tr., p. 442, line 14, to p. 443, line 5; p. 839, line 17, to p. 841, line 25.]

4. On March 26, 1963, the respondents were discharged from their employment [Clk. Tr., p. 73, lines 8-12; p. 79, lines 6-8, 27-32] without just or lawful cause: [Supp. Clk. Tr., p. 410, lines 21-30.] They then brought this action against the Authority to recover

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[7]So much of a substantive point as petitioner seems to have in this proceeding consists of the constant repetition of the contention that the employment contracts were invalid because contrary to the "contributions contract" assertedly executed by PHA and the Authority. [See, *e.g., Pet.*, 9, 15-18, 22, 25, 31.] As we have just seen, PHA's own audit, as well as the report of the petitioner's fiscal officer shows, in complete destruction of that contention, that "*all* [of the Authority's] *fiscal operations and expenditures* [were] reviewed for compliance with Public Housing Administration policies . . . and *contractual provisions* . . . and found to be fully in accordance therewith." (Italics ours.) Obviously, PHA has waived any contention that the employment contracts or use of Authority funds to pay the contract compensation was in violation of the contractual arrangements with PHA.

From this it follows there was no "default" upon which to base any take-over of the Authority's projects by PHA. [See, *Pet.* 18-19.] In point of fact, petitioner's Chairman testified, without contradiction, that there had never been a claim or contention by PHA that the Authority had defaulted or was in default under any of its contracts with PHA. [Rep. Tr., p. 107, lines 1-20.]

damages for that discharge. The Authority was the only party-defendant. [Clk. Tr., p. 1, lines 14-16.] After an extended trial on the merits, general and special verdicts were returned in favor of respondents; and a judgment was entered thereon. [Supp. Clk. Tr., pp. 476-479.] The Authority appealed. [Clk. Tr., p. 133, lines 18-28.] The judgment was affirmed by the State Court of Appeal. The State Supreme Court, without opinion, denied the Authority's petition for a hearing.

Before trial, and in accordance with the California practice, a joint pre-trial statement was agreed to by the parties; and a pre-trial order was made by the trial court, based on that statement. [Clk. Tr., pp. 68-88.] The issues of law and fact to be tried were thereby defined and limited.[8] With the single exception of the question whether the Commissioner of PHA was an indispensable party [Clk. Tr., p. 86, lines 31-32], no issue pertaining to any of the questions petitioner now seeks to present was embraced within that definition. More particularly, there was no issue whatever pertaining to any supposed invalidity of the employment contracts because, assertedly, they were in violation of any contract with PHA or because, assertedly,

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[8]In the California practice, the pre-trial order "becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice . . ." [*Cal. Rules of Court,* rule 216.] The effect of the pre-trial order, therefore, if not modified (and it was not modified in the case at bar), is to limit trial of the cause to the issues defined in the order. [*County of Kings v. Scott,* 190 Cal. App. 2d 218, 225, 11 Cal. Rptr. 893, 897-898; *People v. Valley Drive-In etc. Corp.,* 206 Cal. App. 2d 309, 313-314, 23 Cal. Rptr. 626, 629-630; *City of Los Angeles v. County of Mono,* 51 Cal. 2d 843, 847, 337 P. 2d 465, 468.]

The rule cited may be found in *West's Annotated California Codes,* vol. 23, Pt. 2, p. 30.

they had been declared invalid by PHA. In fact, when the contributions contract was excluded from evidence [Rep. Tr., p. 109, lines 20-26; p. 111, line 23, to p. 112, line 25], one of the grounds of objection to it was that "the validity or invalidity of the employment contracts under the contributions contract is *not an issue in this case*; it was not made an issue by the pleading; it was not made an issue by the pretrial order."[9] [Rep. Tr., p. 110, lines 20-26. Italics ours.]

5. About a month after this action was commenced [Clk. Tr., p. 1, lines 2-7], petitioner made a motion to join Marie C. McGuire, Commissioner of the Public Housing Administration, as an indispensable party, on the ground that she "is such a party."[10] [Supp. Clk. Tr., p. 1, lines 21-31.] The factual showing made in support of the motion was only that, under a contract between the Authority and PHA—not, it should be noted, the "contributions contract"—executed April 11, 1963, possession of certain of the Authority's projects

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[9]The issues that were defined related to: (a) whether the respondents were discharged and what was the amount of their damages [Clk. Tr., p. 83, line 12, to p. 84, line 25; p. 85, lines 21-29; p. 87, lines 5-10]; (b) whether there was justification for the discharge [Clk. Tr., p. 84, line 27, to p. 85, lines 7-20]; (c) whether the contracts were invalid because, under State law, they were for too long a term; or delegated non-delegable duties; or made a gift of public funds; or lacked consideration. [Clk. Tr., p. 85, line 30, to p. 86, line 30; p. 87, lines 11-17.]

Petitioner contended, but respondents denied, that certain other matters—none relating to the questions here sought to be presented by petitioner—were issues to be tried. [Clk. Tr., p. 87, line 18, to p. 88, line 7.] Petitioner can have no grievance in this respect, as the trial court entertained and decided those issues. [Supp. Clk. Tr., p. 400, line 21, to p. 401, line 25; p. 403, line 17, to p. 407, line 11.]

[10]Contrary to petitioner's statement [*Pet.*, 12], this motion was not an oral one, but was made in writing and was based upon a Declaration (or affidavit) in support of it. [Supp. Clk. Tr. pp. 1-6.]

had been turned over to PHA, and that because of that fact the Authority's Commission was without power or ability to prosecute or defend the litigation.[11] [Supp. Clk. Tr., p. 4, lines 13-32; p. 6, lines 7-13.] The motion was denied without opinion. [Clk. Tr. p. 17.]

One year later, the Authority again moved to join Marie C. McGuire, Commissioner of the Public Housing Administration, as an indispensable party. [Supp. Clk. Tr., pp. 369-370.] The notice of motion stated no grounds upon which the motion would be made; the notice did state, however, that the motion would be based upon "the Declaration of Jack E. Hildreth, attached" thereto.[12] [Supp. Clk. Tr., p. 370, lines 1-5.]

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[11]Of course, transfer of possession of the Authority's property, or even delegation of internal management or direction, to persons other than those charged by law with the management, did not destroy or impair the Authority's corporate entity or its existence as a juridical person. It, therefore, had the power and ability to prosecute or defend, regardless of what person or group of persons may have been in directorial control of its affairs. [See, *e.g., Dean v. Davis*, 51 Cal. 406, 409; *Miller v. McColgan*, 17 Cal. 2d 432, 436, 110 P. 2d 419, 421; *Dandini v. Dandini*, 120 Cal. App. 2d 211, 216-217, 260 P. 2d 1033, 1037.]

The Authority exercises "public and essential governmental functions . . ." [*H. & S. Code*, sec. 34310.] Its "power . . . is vested in the commissioners in office from time to time." [*H. & S. Code*, sec. 34275.] The Commissioners, therefore, could not lawfully renounce their governmental powers, or delegate them to others, so far as to incapacitate themselves from exercising the power to sue or be sued [*H. & S. Code*, sec. 34311(a)] to the extent needed to defend the instant litigation. [See, *e.g., Hiller v. Los Angeles*, 197 Cal. App. 2d 685, 689, 17 Cal. Rptr. 579, 581; *San Francisco Gas L. Co. v. Dunn*, 62 Cal. 580, 584; *Egan v. San Francisco*, 165 Cal. 576, 583-585, 133 Pac. 294, 296-297.]

[12]The California practice is that "the notice of motion . . . must state . . . the grounds upon which it will be made, and the papers, if any, upon which it is to be based . . . [*Cal. Code of Civil Procedure*, sec. 1010; Cal. Stats., 1907, c. 327, p. 601, sec. 1.] Failure to comply with this requirement is in itself a

(This footnote is continued on the next page)

That Declaration is not in the record that petitioner has caused to be certified to this Court. The motion was denied without opinion.[13] [Clk. Tr., p. 69, lines 29-31.]

Summary of the Argument.

The petitioner, Housing Authority of the City of Los Angeles, a public agency of the State of California, is a public corporation organized and existing under and by virtue of the laws of California. Among other activities it operates a number of low-rent housing projects, of the sort for which PHA is authorized to render financial assistance. The Authority, as the State court held, is fully authorized by State law to enter into contracts, including contracts for the employment of a Secretary and Assistant Secretary to serve as such for a term of years. The respondents were so employed by the Authority under employment contracts however, whose execution was authorized by the Authority's governing board. Before the end of the contract term they were discharged, without, as the trial

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sufficient reason to deny the motion. [*Silva v. Holland,* 74 Cal. 530, 531, 16 Pac. 385; *W. H. Marston Co. v. Kochritz,* 80 Cal. App. 352, 359, 251 Pac. 959, 963.] There is nothing in the record here to show it was not denied for that reason. [See, also, Point IV, *Second, infra.*] So, in view of the silence or ambiguity of the record in that regard, it must be assumed that the denial was based on this adequate and independent state ground; and, therefore, that this Court's jurisdiction has not been made out. [*Stembridge v. Georgia,* 343 U.S. 541, 547-548; *Durley v. Mayo,* 351 U.S. 227, 281, 284-285. And see, also, *Hedgebeth v. North Carolina,* 334 U.S. 806, 807; *Edelman v. California,* 344 U.S. 357, 358-359, 361-362.]

[13]Because the Declaration is not in the record, there is no way for this Court to determine that the motion was not denied for an adequate and independent state ground having to do with the failure to state any grounds or the insufficiency of the showing made in support of the motion. [See, footnote 12, *supra.*] Nor is there any way to determine that any federal question was raised by the motion.

jury specifically found, just or lawful cause. In the within action, maintained in the State courts, and to which only the Authority was a party-defendant, a judgment in favor of respondents was entered, awarding them damages against the Authority for its breach of contract.

In the course of the action the Authority (but not PHA or any of its officials, although they were entitled so to do in the state practice) moved to join the PHA commissioner as an indispensable party. The motion was denied. The State courts based their rulings solely on the State law, primarily, a general statute that, without discrimination against or separate classification of federal agencies or officials, defined who is an indispensable party to an action in the State courts.

From these facts and the record that has been certified to this court it follows that the petition for a writ of certiorari should be denied, because no federal question was raised or decided in the State courts; and, because the record that petitioner has caused to be certified to this Court does not comply with the requirements of *Rev. Rules,* rule 23, subd. 1.

First: The only question with any possible federal implications is the one dealing with the motion to join an alleged indispensable party; and even those implications arise, not from any federal statute or other provision of law that deals with the question of parties to actions in the State courts, but only from the fact that the person sought to be joined was a federal administrative official. All other questions in the case were quite obviously, indeed concededly, solely of State provenance, They dealt with the validity under State law

of the employment contracts; with the justification for the discharge asserted by the Authority; and with the amount of damages to which respondents were entitled. The joinder question, too, is one of State law, since it is concerned only with the question, determined by nondiscriminatory standards of general application, of who is required to be made a party to actions in the State courts. The joinder application was not made by PHA or any of its officials, but by another and nonfederal party—one who is a California corporation and public agency. Its right to compel joinder arose entirely out of the State law. Its application to that end was decided solely under and by application of the State law. No right in that regard was conferred by federal law, and the courts below did not need to consider or rest their decision, and they did not consider or rest their decision, upon federal law. Petitioner, having in itself no federal right to compel a joinder, is, in effect, impermissibly invoking the federal rights, if any, of a third party.

Second: A federal question, it is contended by petitioner, arises from the asserted conflict between the employment contracts and an "annual contributions contract" between PHA and the Authority, which conflict, it is contended, invalidated the employment contracts. No such question was ever made an issue in this case; it was not litigated; it was not decided. It could not have been decided, because the contributions contract, without which there could have been no question at all, was excluded from evidence by the trial court, upon the ground, among others, that there was no issue in the case to which it was material or relevant. That ruling was not excepted to or assigned as

error on the Authority's appeal. Accordingly, the State appellate court, whose judgment it is here sought to review, was not required to and did not pass upon the correctness of the trial court's ruling. So, there is no decision in respect of it before this Court for review.

No provision of the Housing Act of 1937, upon which petitioner relies, furnishes any support for the contention that the employment contracts were invalid. In any event, no such question was raised or decided below.

Third: The petitioner has not presented "with accuracy, brevity and clearness" the matters "essential to a ready and adequate understanding of the points requiring consideration." [*Rev. Rules,* rule 23, subd. 4.] Essential to such an understanding of the entire argument made by petitioner is the contributions contract; but, it is not a part of the certified record. Similarly, the questions now presented are bottomed on the denial of petitioner's joinder motions. But all of the papers upon which the motions were based and made, are not here. A ready and adequate understanding of the points made in that connection cannot be had without the missing papers. The papers that are here disclose no federal question involved in or decided by the rulings on the motions; but they do disclose the strong possibility that there was an adequate and independent State ground for those rulings. This ambiguous state of the record negates this Court's jurisdiction; and, independently of that consideration, requires the sanction of denial of the petition provided in Rule 23, Subd. 4.

ARGUMENT.

I.

The Question Who Is an Indispensable Party to an Action in a State Court That Is Wholly Between Local Parties and That Involves Only Their Rights Under a Contract to Which No Federal Agency or Official Is a Party, Is a Question of State Law, Not Reviewable by This Court.

The question of who are indispensable parties to a litigation in a State court wholly between private or non-federal parties, is, obviously, one that is dependent entirely upon state law, without federal implications of any kind. [*Cf., Herb v. Pitcairn,* 324 U.S. 117, 120; *City of Boston v. Jackson,* 260 U.S. 309, 313.] Decision of such a question, therefore, is not subject to review here, as the State court's determination of the state law is binding upon this Court. [*Williams v. Kaiser,* 323 U.S. 471, 473; *American Ry. Express Co. v. Kentucky,* 273 U.S. 269, 272-273; *Black v. Cutter Laboratories,* 351 U.S. 292, 298; *Smith v. O'Grady,* 312 U.S. 329, 330.] The case here is no different, even though it was a federal official to whom the joinder motion related.

It is not the federal officer in question, who sought to be joined, or who now complains of the failure to join him. It was the petitioner, a non-federal party, who sought to compel the joinder. The non-federal nature of the question determined below, *i.e.,* who is an indispensable party in the state practice, is not changed by the fact that it was a federal officer whom it was sought to have joined. There is no federal statute, none is cited by petitioner, that made the PHA Commis-

sioner an indispensable party to this local lawsuit. No right has been conferred by federal law upon the *petitioner* to have the Commissioner made a party. Whatever right, if any, to such a joinder that the petitioner may have had was entirely the product of the state statute, which alone defined who were indispensable parties. The state court held that this state statute did not encompass one in the Commissioner's posture and relationship to the subject matter of the litigation. [See, *Pet. App.*, 31-33.] That determination of state law is beyond the power of this Court to review.

It may be that if the *Commissioner* had applied and been refused leave to become a party, a federal question might have been precipitated; but if so, it would have been so, because the Commissioner's right to be a party would have stemmed from federal law, *i.e.*, his interest in the subject matter of the litigation, which he had the power to pursue, would have been created by or derived from federal law.[14] The commissioner made no such application. The petitioner has no federal right in itself. Therefore, when it argues that a federal right was denied by the refusal to join the Commissioner, it is in effect invoking the jurisdiction of this Court to vindicate the federal right of a third

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[14]Petitioner attempts to deduce such an interest from the Housing Act of 1937; but the attempt fails of its objective. [See Point II, *infra.*] Be that as it may, any effort by the Commissioner, in the State court action, to litigate his asserted interest in the subject matter would have to be "pursued according to the procedural requirements" of the State, including the State's definition of who must and who may be a party. [*Cf., Hedgebeth v. North Carolina, supra,* 334 U. S. at 807; *Edelman v. California,* 344 U.S. 357, 358.] The question whether the Commissioner was such a party, is not here, however, as the Commissioner did not apply to be admitted into the action; and is anyway, a question of State law.

party. This it is not permitted to do.[15] [See, *Tileston v. Ullman*, 319 U.S. 44, 46; *McCabe v. A.T. & S.F. Ry. Co.*, 235 U.S. 151, 162-164; *Liberty Warehouse Co. v. Burley T.G. Co-op. Assn.*, 276 U.S. 71, 88.]

II.

Invalidity of the Contracts in Suit by Reason of PHA's Contractual and Statutory Relations With the Authority Was Not a Question Raised or Decided Below.

The PHA's interest in the employment contracts here in suit and, therefore, its status as an indispensable party, are contended by petitioner to arise from the United States Housing Act of 1937 [42 U.S.C., chap. 8, beginning with section 1401] and from an "Annual Contributions Contract" assertedly executed

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[15]PHA, or its Commissioner, had they so desired, could themselves have made an application to be joined as an indispensable party or to be permitted to intervene as one having an interest in the matter in litigation. [*Cal. Code of Civil Procedure*, secs. 387, 389.5; *Crofton v. Young*, 48 Cal.App. 2d 452, 454, 456, 119 P.2d 1003, 1005, 1006; *Muller v. Robinson*, 174 Cal. App. 2d 511, 514, 345 P.2d 25, 27.] Denial of such an application would "finally and adversely determine the right of the moving party to proceed in the action . . ." [Witkin, *California Procedure*, vol. 3, p. 2154, sec. 12(b)], and so, the order of denial would be appealable. [*Bowles v. Superior Court*, 44 Cal. 2d 574, 281-582, 283 P. 2d 704, 709-710; *Dollenmayer v. Pryor*, 150 Cal. 1, 3, 87 Pac. 616; *Walsh v. Superior Court*, 92 Cal. App. 454, 456, 268 Pac. 442, 443.]

PHA and its Commissioner, therefore, had a ready and effective method by which to assert and vindicate in the State court, and, if necessary, in review here, any federal right either of them may have had to be a party. They did not pursue or act to vindicate whatever federal right they had. This is not a case where the third party whose rights are invoked would have found it "difficult if not impossible" himself to assert them. [See, *Barrows v. Jackson*, 346 U.S. 249, 255-258.] It follows that there is no reason to permit another to invoke the third party's rights.

So far as petitioner is concerned, *its* right to compel joinder stems entirely from state law. Plainly that right is not a permissible basis of certiorari jurisdiction.

by the Authority and PHA. From these sources, petitioner says, PHA derived the power so to control the operations of the Authority, an official agency of the State of California, as to be entitled to invalidate or disavow contracts into which the Authority, fully authorized by State law to do so, had entered. [See, *e.g., Pet.,* 9, 15-20, 22, 25.] The argument is a specious one.

First: So far as the "Annual Contributions Contract" is concerned, the argument is wholly without support, since the contract was not in evidence below, and could not properly have been brought here. No reference to it was made in the opinion of the State court. No issue arising out of the contributions contract was litigated. To be sure, the validity of the employment contracts was challenged by petitioner on quite a few grounds—but invalidity because of conflict with the contributions contract or because of invalidation by PHA, was not one of those grounds, for the reason, among others, that it was not an issue in the case.

Furthermore, the contract is not in the record, so the argument based on it is without the requisite record support. [See, footnote 20, *infra.*]

Second: The United States Housing Act of 1937 also fails to support the argument. Nowhere in that legislation will there be found any grant of power to PHA to direct or control the operations of a local housing authority or similar state agency, or to approve or annul the local agency's otherwise authorized contracts. The most that can be said is that PHA may exact some limited form of supervision as a provision of the contributions contract it will make. [See, 42

U.S.C., sec. 1410, *passim.*] The specific parts of the Act cited by petitioner [42 U.S.C., secs. 1401, 1410, 1413, 1415, 1421] emphasize the correctness of our assertion, for in these sections there will be found grants of power in many other respects, but none in respect of the matters to which petitioner refers and upon which it relies.[16] [See, *Pet.*, 4, 8, 17, 21-22, 25.] Had it intended

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[16]For convenience, we summarize the provisions of the Housing Act of 1937 upon which petitioner seems to rely:

(a) 42 U.S.C., sec. 1401 declares the policy of the United States to assist the several States and their political subdivisions to alleviate unemployment and to remedy unsafe and insanitary housing conditions. Significantly enough, it is said in this declaration that it is "the policy of the United States to vest in the [local] *public housing agencies* the *maximum* amount of responsibility in the administration of the low-rent housing program. . ." (Italics ours.) That policy hardly comports with the strict and dictatorial control over a housing authority's operations that is subsumed in petitioner's argument.

(b) Section 1410 authorizes PHA to make annual contributions to public housing agencies "to assist in achieving and maintaining the low-rent character of their housing projects . . ."; not, as petitioner says [*Pet.* 20], to pay off their bonded indebtedness. [42 U.S.C., sec. 1410(a).] Accordingly, there are detailed provisions in the statute dealing with such matters as: (1) The basis upon which the contributions may be made [42 U.S.C. sec. 1410(a)]; (2) the limits upon the amount that may be contributed [42 U.S.C., sec. 1410(b)]; (3) the formula for reducing the amount when a housing agency's receipts exceed its expenditures—but, significantly, no *limit* is put upon those *expenditures* nor is any control over them given [42 U.S.C., sec. 1410(c). Italics ours]; (4) the privilege of PHA to require a pledge of the annual contributions as security for any loans obtained by a public housing agency—but, there is no evidence here that PHA required the contributions made to petitioner to be so pledged. [42 U.S.C., sec. 1410(f).]

(c) 42 U.S.C., sec. 1413(a), gives PHA the power to foreclose on any property, commence actions to protect any rights conferred upon it by law or contract, and acquire or take possession of any project it previously owned or in connection with which it made a loan, annual contribution or capital grant. There is no evidence in this case that PHA had any forecloseable or other right against the Authority's property, whether conferred by law or contract. The right to take possession referred to in this section is one to be exercised pursuant to 42 U.S.C., sec. 1421a.

to confer any powers other than those it expressly mentioned, "Congress doubtless would have said so." [*Cf., United States v. Borden Co.,* 308 U.S. 188, 201.]

Third: If PHA had any right, whatever its source, to object to or annul the employment contracts or to prevent payment of the compensation provided for in them, the right was waived by PHA's concurrence in and failure to except to the contracts and expenditures in question. It had full knowledge of them through its annual audits and triennial review of the Authority's operations. [See, Counter-Statement of the Case, sec. 3, *supra, passim;* and, in particular, footnote 7, *supra.*]

III.

Except for Joinder of an Alleged Indispensable Party, None of the "Questions Presented for Review" Was Raised or Decided Below.

Except for the question relating to failure to join the PHA commissioner as an indispensable party, none of the questions "presented for review" [*Pet.,* 3] was raised or decided below. There is, therefore, nothing in respect of them for this Court to review.

First: We have already noted [see footnotes 8 and 9, and accompanying text, *supra*] that none of these questions was embraced within the issues that were to

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That section specifies what may be included in an annual contributions contract, including a provision for delivery of possession in the event of a substantial default—but, there is no such contract in evidence here.

(d) 42 U.S.C., sec. 1415(3) gives PHA the right to reduce or terminate annual contributions in the event of a substantial breach of the condition, to be embodied in a contributions contract, for maintenance of the low-rent character of the housing project involved. There is no contributions contract in evidence here; nor is there evidence that there was any such breach.

be tried. By the same token, none of them was decided. The absence of any such decision in the trial court may be readily ascertained from the Findings of Fact and Conclusions of Law made in respect of the issues submitted to the trial court sitting without a jury [Supp. Clk. Tr., pp. 397-407]; and, from the instructions given the jury, on the issues submitted to them. [Supp. Clk. Tr., pp. 439-475.] The questions thus entertained and decided, it will be seen, were concerned entirely with either, the validity of the employment contracts upon grounds having nothing to do with PHA or its statutory or contractual relationship with the Authority; or with the discharge, its asserted justification, and the damages recoverable on account of it.

None of the questions now presented was raised or decided on the appeal.[17] [See, *Pet. App.* 1-55.] Except

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[17]These were the only matters discussed and decided in the opinion of the Court of Appeal:

(1) The employment contracts were not void for the reason that they covered a period extending beyond the terms of office of members of the Authority's commission. [*Pet. App.*, 8-12.]

(2) The contracts were not invalid as delegating non-delegable duties to the employees. [*Pet. App.*, 12-14.]

(3) The jury's special verdicts that the discharge of respondents was without just or lawful cause, were supported by evidence showing no justification for the discharge. [*Pet. App.*, 14-27.]

(4) The contracts were not invalid under the limitation upon the length of terms of office imposed by section 16 of article XX of the State Constitution. [*Pet. App.*, 27-31.]

(5) PHA was not an indispensable party, nor was it a conditionally necessary party, within the meaning of section 389 of the California Code of Civil Procedure. [*Pet. App.*, 31-33.]

(6) The Authority's plan of retirement benefits was not invalid as a gift of public funds. [*Pet. App.*, 31-36.]

(7) Rescission of the old and execution of new employment contracts was not a gift of public funds; and the con-

for the question about joinder of an indispensable party, all of the questions that petitioner now presents depend upon the premise that the contributions contract and the cited provisions of the Housing Act of 1937 made the employment contracts invalid and gave PHA the right to disavow or annul them. [See, *Pet.* 3, 15-18.] The short answer to this entire presentation is that the questions were not raised or decided below; nothing in the judgment, sought to be reviewed here, was based upon or arose out of those questions. [See, footnotes 9 and 17, *supra.* See, also, Point II, *supra.*]

Second: The judgment is not one against the United States. [*Pet.*, 18-19, 21-22.] Neither the United States nor any United States officer, agency or instrumentality, is a party to the action. The mere fact that possession of the Authority's housing projects, *i.e.*, its real property, may have been turned over to a federal administrative official, does not change the fact that the only party-defendant, the only judgment debtor, is a *State agency,* which is a body corporate and politic and, therefore, a separate entity or juridical person. [See, footnote 11, *supra.*] PHA's possession of the real property, even assuming it to be a lawful possession [see, footnote 11, *supra*], will not be

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tracts were supported by a consideration. [*Pet. App.*, 37-39.]

(8) The contracts did not provide the employees with an automobile for personal use, but for business use, and, so, did not violate the State's statutory proscription of personal use of public-owned cars. [*Pet. App.*, 39.]

(9) A jury instruction relating to notice to a commissioner being notice to the Authority, was not erroneous. [*Pet. App.*, 39-42.]

(10 The judgment against respondent Holtzendorff and in the Authority's favor on the latter's cross-complaint was not erroneous. [*Pet. App.* 42-55.]

disturbed by this judgment. [*Cf., Land v. Dollar,* 330 U.S. 731, 738.] Under the State law, the Authority's real property is exempt from execution. [*H. & S. Code,* sec. 34217.[18]]

Third: The contention that the State court was without jurisdiction because jurisdiction in suits against the United States is vested in a United District Court or Court of Claims [*Pet.* 3, 21-22], even if it were made below—which it was not [see, footnotes 9 and 17, *supra*]—is quite without merit. The cited statutes no doubt confer original jurisdiction upon the courts mentioned. Neither statute, however, purports to make that jurisdiction exclusive of the jurisdiction, such as in contract litigation, which the State courts have traditionally exercised. In such a case, the statutory federal jurisdiction is not exclusive, as has been decided, in cases such as those next cited, with respect to virtually identical statutory and constitutional provisions.[19] ". . . The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State courts. . . ." [*Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 503-506. To the same effect: *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383-384.]

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[18]Section 34217 so far as material here, is as follows:

"Execution or other judicial process shall not issue against the real property of an authority nor shall any judgment against an authority be a charge or lien upon its real property. . ."

[19]No question arises of any consent by the United States to be sued. It has not been sued. [See, Point III, *Second, supra.*] Indeed, it is the petitioner who, inconsistently enough, insists that it be sued by the joinder of the PHA commissioner. If it had been sued, it would have been for it, not a third party, to invoke its immunity.

IV.

The Record Presented by Petitioner so Far Fails to Include Matters Necessary to a Ready and Adequate Understanding of the Points Made, as to Justify Denial of the Petition.

It is no doubt the duty of a petitioner "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration . . ." [*Rev. Rules,* rule 23, subd. 4.] The petitioner here has so far failed to render performance of that duty as to justify imposition of the sanction specified in the rule—denial of its petition.

First: The principal point made by petitioner, the one upon virtually all else in the petition is grounded, is that PHA by virtue of a "contributions contract" with the Authority was invested with the right to control the latter's contracts and to annul them, which right it exercised because, allegedly, the employment contracts were in violation of the contributions contract. [See, *e.g., Pet.* 9, 15-20, 22, 26.] Obviously, what is "essential to a ready and adequate understanding" of that point is the "contributions contract". It is not here; it was never received in evidence; and no question arising out of it was litigated or decided. Thus, it is not merely that the certified record here does not present what is essential to an understanding of the point.[20] It is also, that it is shown that there is

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[20]This Court, of course, "must look only to the certified record in deciding questions presented. . ." [*Lawn v. United States,* 355 U.S. 339, 354. To the same effect: *Ciucci v. Illinois,* 356 U. S. 571, 573; *McClellan v. Carland,* 217 U.S. 268, 282-283.]

In this connection it may be noted that in requiring a petitioner to file "a transcript of the record in the case" [*Rev. Rules,* rule

(This footnote is continued on the next page)

no decision, involving or based on that point, to be reviewed. So it is that petitioner's argument, premised as it is on the asserted conflict between the employment contracts and a contributions contract, is left unrooted in the facts of the case or in any decision of the court below.[21]

Second: The only ruling below that in any way involved any of the questions that petitioner now presents, was the ruling that the Commissioner, not being indispensable within the meaning of California statute on the subject, did not have to be joined. Obviously essential to a ready and adequate understanding of that point, and to a determination whether the ruling was based on a federal ground, are the motion papers. They are here only in part. [Supp. Clk. Tr. pp. 1-12; pp. 369-370.] The most important part, the factual showing, upon which the petitioner now bases its conten-

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21, subd. 1], the interpretative inference is that the rule calls for the entire record, not just so much or so little of it as the petitioner may arbitrarily or whimsically determine. That is shown by the absence in the rule of any provision for designation and counter-designation of the parts of the record to be certified, whereas in the comparable case of an appeal there is such a provision. [*Rev. Rules,* rule 10, subd. 2(b); rule 12, subd. 1.]

[21]It is permissible for us to say that among the papers filed in support of the second motion to join Commissioner McGuire there was a declaration of Jack E. Hildreth, as the notice of motion names it among the papers upon which the motion would be based. [Supp. Clk. Tr., p. 370, lines 1-4.] Even that declaration is not here; so it cannot be ascertained if a copy of a "contributions contract" was attached to it. It would make no difference if it had been. The declaration, as well as the other motion papers, was before the court only for purposes of the motion; not as any part of the evidence going to the merits of the action. The significant facts in the present context are that the contract was not received in evidence at the trial on the merits; no question arising out of it, particularly no question of the sort now being urged, by petitioner, was litigated or decided; and the judgment sought to be reviewed is not based upon it. [See, Point III, *supra.*]

tion that the Commissioner had the requisite interest, *i.e.*, the contributions contract, is not here. Indeed, there is no showing that it was even before the court below, even in connection with either of the motions, to join the Commissioner, as there is no reference to it in such of the motion papers as are here. For all that the record before this Court shows, the motions may have been properly denied upon some such adequate and independent state ground as a factually insufficient showing that the Commissioner fitted the statutory definition of an indispensable party. [See, footnote 12, *supra.*]

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HERMAN F. SELVIN,
CHARLES E. JONES,
Attorneys for Respondents.